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4 UNITED STATES DISTRICT COURT  
5 CENTRAL DISTRICT OF CALIFORNIA  
6 WESTERN DIVISION  
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8 LEVAR BROWN,

9 Petitioner,

10 v.

11 LEROY BACA,

12 Respondent.  
13  
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Case No. CV 12-8475-VAP (MLG)

MEMORANDUM OPINION AND ORDER  
DISMISSING PETITION WITHOUT  
PREJUDICE AND DENYING CERTIFICATE  
OF APPEALABILITY

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16 **I. Factual and Procedural Background**

17 Levar Brown filed this first amended petition for writ of habeas  
18 corpus, pursuant to 28 U.S.C. § 2254, on October 17, 2012.<sup>1</sup> The first  
19 amended petition reveals that Petitioner is awaiting trial in the Los  
20 Angeles County Superior Court on two counts of robbery and one count  
21 of burglary. There is also a probation violation hearing pending.  
22 Although the petition is difficult to understand, it appears to set  
23 out a litany of complaints regarding the pretrial proceedings in  
24 Petitioner's pending criminal case. Petitioner claims that the trial  
25 court will not allow the defense "adequate representation" and  
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<sup>1</sup> The original petition, filed on October 3, 2012, was dismissed with leave to amend on October 5, 2012.

1 Petitioner certain discovery material.<sup>2</sup> He complains about the  
2 Court's delay in hearing a motion to suppress evidence and the  
3 inability to use the law library at the jail. He further claims that  
4 exculpatory material has been withheld by the prosecutor.

5 This petition mirrors one filed on April 25, 2012, which was  
6 dismissed without prejudice June 11, 2012, based on the abstention  
7 doctrine of *Younger v. Harris*, 401 U.S. 37, 43-54 (1971). *Brown v.*  
8 *Baca*, Case No. CV 12-3593-VAP (MLG). Because the current petition  
9 challenges the same pending state criminal charges and because no  
10 judgment has been entered in that case, this Court will not intervene  
11 in those state court proceedings, and the petition will be dismissed  
12 without prejudice.

## 13 14 **II. Screening Requirement**

15 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in  
16 the United States District Court, a district court may summarily  
17 dismiss a habeas corpus petition, before the respondent files an  
18 answer, "[if it plainly appears from the face of the petition ...  
19 that the petitioner is not entitled to relief." The notes to Rule 4  
20 state: "a dismissal may be called for on procedural grounds, which  
21 may avoid burdening the respondent with the necessity of filing an  
22 answer on the substantive merits of the petition." See *Boyd v.*  
23 *Thompson*, 147 F.3d 1124, 1127-28 (9th Cir. 1998). It is beyond  
24 question that the is not cognizable under either 28 U.S.C. § 2241 or  
25 28 U.S.C. § 2254. Accordingly, summary dismissal of the petitions is  
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28 <sup>2</sup> It may be that Petitioner is currently representing himself in  
these state court criminal proceedings.

1 warranted. <sup>3</sup>

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6 <sup>3</sup> Petitioner has consented to the exercise of consent jurisdiction  
 7 by the United States Magistrate Judge. "Upon the consent of the  
 8 parties," a magistrate judge "may conduct any or all proceedings in a  
 9 jury or nonjury civil matter and order the entry of judgment in the  
 10 case." 28 U.S.C. § 636(c)(1). Here, Petitioner is the only "party" to  
 11 the instant proceeding and has consented to the jurisdiction of the  
 12 undersigned United States Magistrate Judge. Respondent has not yet been  
 13 served with the Petition and therefore is not a party to this  
 14 proceeding. See, e.g., *Travelers Cas. & Sur. Co. of Am. v. Brenneke*,  
 15 551 F.3d 1132, 1135 (9th Cir. 2009) ("A federal court is without  
 16 personal jurisdiction over a defendant unless the defendant has been  
 17 served in accordance with Fed. R. Civ. P. 4." (internal quotation marks  
 18 omitted)). Thus, all parties have consented pursuant to 28 U.S.C. §  
 19 636(c)(1). See, e.g., *Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995)  
 20 (holding that magistrate judge had jurisdiction to dismiss prison  
 21 inmate's action under 42 U.S.C. § 1983 as frivolous without consent of  
 22 defendants because defendants had not been served yet and therefore  
 23 were not parties); *United States v. Real Property*, 135 F.3d 1312, 1317  
 24 (9th Cir. 1998) (holding that magistrate judge had jurisdiction to  
 25 enter default judgment in an in rem forfeiture action even though  
 26 property owner had not consented to it because 28 U.S.C. § 636(c)(1)  
 27 only requires the consent of the "parties" and the property owner,  
 28 having failed to comply with the applicable filing requirements, was  
 not a "party"); see also *Patrick Collins, Inc. v. Doe*, 2011 U.S. Dist.  
 LEXIS 125671, at \*4 n.1 (N.D. Cal. Oct. 31, 2011) ("Here, Plaintiff has  
 consented to magistrate jurisdiction and the Doe Defendants have not  
 yet been served. Therefore, the Court finds that it has jurisdiction  
 under 28 U.S.C. § 636(c) to decide the issues raised in the instant  
 motion(s)."); *Third World Media, LLC v. Doe*, 2011 WL 4344160, at \*3  
 (N.D. Cal. Sept. 15, 2011) ("The court does not require the consent of  
 the defendants to dismiss an action when the defendants have not been  
 served and therefore are not parties under 28 U.S.C. § 636(c).");  
*Kukiela v. LMA Prof'l Recovery Group*, 2011 U.S. Dist. LEXIS 85417, at  
 \*1 n.1 (D. Ariz. Aug. 1, 2011) ("Plaintiff consented to proceed before  
 a United States Magistrate Judge for all proceedings in this case,  
 including entry of final judgment, pursuant to 28 U.S.C. § 636(c)(1).  
 (Doc. 7.) Because Defendant did not appear and establish its standing  
 as a party in this action, the Magistrate Judge has jurisdiction to  
 enter the requested default judgment."); *Quigley v. Geithner*, 2010 WL  
 3613901, at \*1 (D. Idaho Sept. 8, 2010) ("Plaintiff, the only party  
 appearing in this case, has consented to the jurisdiction of a United  
 States Magistrate Judge to enter final orders in this case."); *Ornelas*  
*v. De Frantz*, 2000 WL 973684, at \*2 n.2 (N.D. Cal. June 29, 2000) ("The  
 court does not require the consent of defendants in order to dismiss  
 this action because defendants have not been served, and, as a result,  
 are not parties under the meaning of 28 U.S.C. § 636(c).").

1 III. The Court Will Abstain from Intervening in the Pending State  
2 Proceedings.

3 Because Petitioner is still a pretrial detainee in that he has  
4 not yet been tried on the pending charges, the Court has construed  
5 the petition as one filed pursuant to 28 U.S.C. § 2241. *Braden v.*  
6 *Judicial Circuit Court*, 410 U.S. 484, 503 (1973) (Rehnquist, J.,  
7 dissenting); *McNeely v. Blanas*, 336 F.3d 822, 824 n.1 (9th Cir.  
8 2003).<sup>4</sup> Federal courts generally abstain from interfering with  
9 pending state criminal proceedings before the entry of a judgment of  
10 conviction. *Braden*, 410 U.S. at 489. In *Younger v. Harris*, 401 U.S.  
11 37, 43-54 (1971), the Supreme Court strictly limited a federal  
12 court's ability to intervene in an ongoing state criminal proceeding.  
13 A federal court must abstain from addressing an asserted violation  
14 of a federal constitutional right where (1) state judicial  
15 proceedings are still pending, (2) the state proceedings implicate  
16 important state interests, and (3) the state proceedings offer an  
17 adequate opportunity to put forward the federal question. *Middlesex*  
18 *County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432  
19 (1982); *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 223-24  
20 (9th Cir. 1994). All three elements must be present in order for  
21 abstention to be appropriate. *Agriesti v. MGM Grand Hotels, Inc.*, 53  
22 F.3d 1000, 1001 (9th Cir. 1995).

23 Only when a person subject to state criminal prosecution can  
24 show that he will suffer irreparable injury, which is both great and  
25 immediate, may intervention be warranted. *Younger v. Harris*, 401 U.S.

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27 <sup>4</sup> Section 2254 applies only to a prisoner challenging a judgment  
28 of conviction of a state court. Because trial is still pending and  
there is no judgment of conviction, section 2254 is not applicable.  
*Blanas*, 336 F.3d at 824 n.1.

1 at 46. Irreparable injury has been found where a state is attempting  
2 to hold a second trial after a defendant has been tried on the same  
3 offense, *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992),  
4 and when a defendant has been denied his right to a speedy trial,  
5 *McNeely v. Blanas*, 336 F.3d at 832 (holding that pretrial delay of  
6 over five years violates speedy trial rights). See also *Brown v.*  
7 *Ahern*, 676 F.3d 899, 903 (9th Cir. 2012). Special circumstances which  
8 might warrant federal intervention before trial also include proven  
9 harassment and bad faith prosecutions. *Carden v. Montana*, 626 F.2d  
10 82, 84 (9th Cir. 1980).

11 Although there is no exhaustion requirement under section  
12 2241(c)(3), principles of comity and federalism require a federal  
13 court to abstain from deciding pre-conviction habeas corpus  
14 challenges unless a petitioner demonstrates that (1) he has exhausted  
15 available state judicial remedies, and (2) "special circumstances  
16 warrant federal intervention." See *Carden v. Montana*, 626 F.2d 82,  
17 83-84 (9th Cir. 1980). Here, Petitioner has not raised these claims  
18 for relief in the California Court of Appeal or Supreme Court.

19 Regardless, Petitioner has failed to demonstrate any special  
20 circumstance or irreparable injury that would warrant federal  
21 intervention and which cannot be addressed by the state courts in an  
22 orderly fashion. It is clear from the petition itself that Petitioner  
23 simply is unhappy with the superior court's rulings on pretrial  
24 matters and believes that the federal courts should now intervene in  
25 his favor. Petitioner has therefore failed to present any compelling  
26 reason for this federal court to interfere with the ongoing state  
27 criminal proceeding.

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1 All three elements warranting abstention are present. State  
2 judicial proceedings are on-going; the state proceedings involve the  
3 enforcement of state criminal laws, an important state interest; and  
4 Petitioner will have an adequate opportunity to raise his  
5 constitutional claims on appeal in the California courts, after he  
6 is sentenced. Accordingly, the Court finds that abstention is proper  
7 with respect to the still-pending failure to register charge.

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9 **III. Conclusion**

10 For the reasons stated above, this petition is **DISMISSED** without  
11 prejudice.

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13 **CERTIFICATE OF APPEALABILITY**

14 A certificate of appealability will not issue. Reasonable  
15 jurists would not find the dismissal of the petition as successive  
16 debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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18 Dated: October 22, 2012

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22 Marc L. Goldman  
23 United States Magistrate Judge  
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